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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1966

No. 1164

SAUL LANDAU,

Petitioner,

vs.

ADDISON FORDING, CHIEF OF POLICE, BERKELEY, CALIFORNIA; EARL BERGFELD, DIRECTOR, SPECIAL INVESTIGATIONS BUREAU OF THE POLICE DEPARTMENT OF BERKELEY, CALIFORNIA; THE POLICE DEPARTMENT OF THE CITY OF BERKELEY, CALIFORNIA; AND THE CITY OF BERKELEY, CALIFORNIA,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

to the Court of Appeal of the State of California, First Appellate District, Division Two

STATEMENT OF THE CASE

Petitioner seeks a writ of certiorari to review a judgment of the Court of Appeal of the State of California that the film "Un Chant d'Amour" is obscene within the meaning of California Penal Code section

311(a). Said section 311(a) is set forth at pages 3 and 4 of petitioner's petition.

The action was instituted by petitioner as a civil proceeding in the Superior Court of the State of California in and for the County of Alameda seeking declaratory relief—a declaration by the Court that the film in question is not obscene within the meaning of the cited statute. Such form of action is appropriate in California. *(Zeitlin* v. *Arnebergh* [1963], 59 C. 2d 901.) The trial court declared the film to be obscene within the meaning of that statute, the Court of Appeal affirmed and the Supreme Court of California denied a hearing.

REASONS FOR DENYING CERTIORARI

Petitioner Has Stated No Ground For Granting Certiorari

Petitioner has advanced only two arguments why certiorari should be granted, namely, that the California court wrongly applied the *Ginzburg* test in three respects and that material of undisputed redeeming social importance has been censored.

A. The GINZBURG Test is Not Involved in This Case.

At the outset it should be noted that this case was decided by the trial court before this Court even announced its decision in *Ginzburg* v. *United States* (1966), 383 U. S. 463.

The California Court of Appeal in its opinion referred to the *Ginzburg* decision twice. That Court mentioned the *Ginzburg* decision as "indicating that apart from the nature of the material, the conduct of the disseminator and the commercial context in which the dissemination occurs are significant." (Page XX, Appendix A, Petition for Writ of Certiorari.) The Court of Appeal did not in any way rely upon this statement concerning the *Ginzburg* holding in reaching its decision.

The conduct of the disseminator has never been at issue in this case. Petitioner in seeking declaratory relief (his selection of remedy) has asked the court to rule that the film is not obscene within the meaning of the statute (the constitutionality of which has never been questioned) *for any purpose and under any circumstances.* He is, in effect, asking the court for carte blanche for the showing of this film without any limitation whatsoever!

The second reference to the *Ginzburg* decision by the California Court of Appeal is set forth at page XXIX of Appendix A of the Petition for Writ of Certiorari, wherein it is stated that "Applying the criteria recently set forth in *Ginzburg* v. *United States*, supra, we are therefore, *further* propelled toward the conclusion that it is utterly without redeeming social importance and that it meets all of the requirements set forth in section 311, subdivision (a) of the Penal Code."

(Emphasis added.) The court immediately thereafter referred to the statement of Mr. Justice Stewart in *Jacobellis* v. *Ohio* (1964), 378 U. S. 184, that "hard-core pornography is hard to define but he 'knew it when he saw it'." The Court then concluded that, "We think we have seen it in 'Un Chant d'Amour'. It is nothing more than hard-core pornography and should be banned."

It is apparent from the above quotations that the California Court of Appeal did not rely to any significant degree upon any criteria or test announced by this Court in the *Ginzburg* case. Thus, even accepting petitioner's argument that the *Ginzburg* test was wrongly applied in three respects by the California Court of Appeal (which contention, it is submitted, is erroneous in any event), it forms no basis for granting the writ of certiorari because the application of such test was not the basis of the decision by the California Court of Appeal.

B. "Un Chant d'Amour" is Utterly Without Redeeming Social Importance.

In contending that "material of undisputed redeeming social importance has been censored" (by the decision of the California Court), petitioner advances a series of inconsistent arguments. First he states that "It is now settled that whether material is protected by the First Amendment, must be decided by an independent constitutional determination by Appellate

Courts and cannot simply be left to the trier of fact." (Page 20, Petition for Writ of Certiorari). In the very next paragraph (Page 21) he challenges the validity of his own statement. He then contends that the only evidence that can be considered is oral testimony of so-called experts, completely ignoring the only real piece of evidence in the entire case—the film itself. He also argues that the film could not be pornographic in any event because the author is JEAN GENET, a person recognized by some as a man of letters.

In questioning the right or jurisdiction of the Court to determine the question of obscenity, petitioner is, in effect, challenging the sole basis upon which he has any standing in the appellate courts at all. All of the cases upon which he relies in his attempt to justify his position are cases in which the court has made the ultimate determination of obscenity. Petitioner is apparently willing to accept those decisions which resulted in a determination favorable to his viewpoint or established a rule which might give him standing in the appellate courts, but is unwilling to accept the assumption by the Courts of the right to make the ultimate determination of obscenity in any case establishing a rule or announcing a decision unfavorable to his viewpoint. He wants to have it both ways—the Court should hear me because it must make the ultimate determination of obscenity, but the Court does not have the right to make such ultimate determination! Which way is it to be?

Respondents' position in regard to petitioner's arguments concerning the function of the courts in this case and the evidence to be considered may be very simply stated: the California Legislature has seen fit to define "obscene" in Section 311(a) of the Penal Code. The definition is an obvious attempt by the Legislature to comply with the pronouncements of this Court in the cases in which it has considered the question of obscenity in relation to the freedom of expression guaranteed by the United States Constitution. (The legislative action leading up to the adoption of this statutory definition is reviewed in *Zeitlin* v. *Arnebergh, supra).* Because the term has been thus defined by statute, the determination of whether a particular matter or thing is obscene within the meaning of that definition becomes a legal question, and the only pertinent fact in a declaratory relief action is the matter or thing (in this case, a film) itself. As pointed out in *Aguirre* v. *Southern Pac. Co.* (1965) 232 CA 2d 636, when the facts of a given situation have been resolved, construction of a statute and its applicability to that given situation are matters of law to be determined by the court. In this case the fact of the given situation is the film; the applicability of the statute (definition of "obscene") to the given situation (the film) is a matter of law for the court's determination.

At the trial of this action respondents objected to all testimony of petitioner's so-called "expert" wit-

nesses. It is respondents' contention that such testimony was inadmissible since it was not relevant to any determination to be made. It related solely to the question of the applicability of the statute—a legal question to be determined by the court.

Respondents' position in this regard is fully substantiated by the decision of the California Supreme Court in *Zeitlin* v. *Arnebergh, supra.* In that case, the plaintiff sought declaratory relief that the book "Tropic of Cancer" was not obscene within the meaning of Section 311(a). A general demurrer to the complaint was sustained without leave to amend and a judgment dismissing the action was entered. The trial judge in a memorandum entry in the minutes stated that he had upheld the demurrer both because, having read the book, he determined it to be obscene and because plaintiff had failed to state a cause of action. The California Supreme Court reversed, holding that the particular book before it was not obscene within the meaning of the Penal Code section. The case was thus decided solely on the basis of the book itself and the application of the statute as a matter of law by the court. The court stated, at page 901: *"Our second question turns upon whether the issue of the application of the statute to this book, within constitutional limitations, rests ultimately with the court, as a matter of law, or with the jury as a question of fact. We think it a legal issue."* And at page 910: *"The dispute, rather, pivots*

upon whether the volume transgresses the standards imposed by the Legislature or by the Constitution; our judicial system entrusts this decision ultimately to the courts." (Emphasis added.)

Thus, the appropriate procedure for an appellate court in this case is to view the film and apply the statute to that film as a matter of law. The testimony of petitioner's "experts" is not relevant or pertinent to the determination of that legal question and must be disregarded.

Strangely, if the rule were not as contended by respondents, there would have been no basis whatsoever for petitioner's appeal. If the question of the application of the definition to a particular matter were one of fact, the factual finding by the trial court would be binding on the appellate court except in the absence of evidence sufficient to support such finding. Petitioner cannot successfully contend that there is not sufficient evidence to support the finding, because the film speaks for itself as the very best evidence to support it.

The determination that the film "Un Chant d'Amour" is obscene within the meaning of Section 311(a) can readily be made by viewing the film itself. There is absolutely nothing in the film but the obscene display of male masturbation, fondling of private parts, evident oral copulation, sodomy—the treatment of sex in a fundamentally offensive manner. Where sex

is treated in a fundamentally offensive manner, the matter or thing in which it is so treated cannot have any redeeming social importance.

In *Roth* v. *United States* (1957), 354 U. S. 476, this Court affirmed the conviction of defendants for violation of certain obscenity statutes. The Court announced the rule that obscene matter is not within the area of constitutionally protected speech or press. The Court also stated in that case that "Obscene material is material which deals with sex in a manner appealing to prurient interest," and further indicated that the matter or thing being judged must be taken as a whole and that its effect must be considered not upon any particular class but upon all those whom it is likely to reach. These are the standards that are still being applied, as is clearly evidenced by the opinion in *Jacobellis* v. *Ohio* (1964), 378 U. S. 184.

The apparent contention that because the film is by GENET it cannot be classified as obscene is totally devoid of merit. Pornography can occur by the hand or effort of a man of artistic ability as well as by the hand of one without.

Any testimony offered as to the "redeeming social importance" of any work, be it book, picture or film (assuming, without conceding, that such testimony is admissible for such purpose), must be tempered by a judicial consideration of the work itself. Consideration

must also be given to the type of work involved. As so ably stated by the California Court of Appeal in its opinion in this case: ". . . the constitutional protection afforded does not mean that the visual impact of a motion picture as distinguished from other media can be disregarded. Films are obviously different from other forms of expression *(Freedman* v. *Maryland*, 380 U. S. 51, at p. 61). The significance of the motion picture medium is due to the technological features of the particular medium. The unique combination of sight and sound that characterizes a motion picture makes the ideas presented by movies comprehensible to a larger audience than is the case in any other medium except television (see materials cited in 60 Yale L.J. 696, fns. 27 and 28, at pp. 707-708, and 42 Cal. L. Rev., 122, fn. 53, at p. 128). Even in the absence of sound, movies assure a high degree of attention and retention. The focusing of an intense light on a screen and the semi-darkness of the room where distracting ideas and suggestions are eliminated contribute to the forcefulness of movies and their unique effect on the audience (60 Yale L.J., supra, at p. 708).

"Because of the nature of the medium, we think a motion picture of sexual scenes may transcend the bounds of the constitutional guarantee long before a frank description of the same scenes in the written word. We cannot here disregard the potent visual impact of the movie in depicting acts of male mastur-

bation, fellatio, oral copulation, voyeurism, nudity, sadism and sodomy . . ."

CONCLUSION

Petitioner has stated no valid ground for the granting of the petition for writ of certiorari. The opinion of the California Court of Appeal is in accord with the statutes of the State of California, the Federal Constitution and the decisional law of this Court.

The *Ginzburg* test was not wrongly applied by the Court of Appeal, and, in any event, any criteria established by *Ginzburg* would not be pertinent because petitioner is seeking relief that bears no relation whatsoever to the method of dissemination of the film. He is seeking a declaration that the film is not obscene within the meaning of an admittedly constitutional statute and if such declaration were obtained there would be no limitation as to the dissemination, distribution or showing of said film.

The film is utterly without redeeming social importance. This conclusion is readily ascertainable from the film itself which is the only proper, pertinent and relevant evidence before the Court. The fact that the film is the work of JEAN GENET, a person recognized by some as a man of artistic distinction, is completely irrelevant to a determination of the question of obscenity.

The petition for writ of certiorari should be denied.

Dated at Berkeley, California, this 10th day of April, 1967.

Respectfully submitted,

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